

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CITIBANK N. A., as Trustee,

**Plaintiff,**

CASE NO. 08cv1301-LAB (RBB)

## **ORDER GRANTING PLAINTIFF'S MOTION TO REMAND**

[Dkt No. 4]

JOSE E. ORTIZ, and Does 1 though 100,  
inclusive,

## Defendants.

This matter is before the Court on plaintiff's Motion To Remand ("Motion") for lack of federal jurisdiction over this unlawful detainer action and for procedural defects in the removal procedure. The deadline for *pro se* defendant Jose E. Ortiz ("Ortiz") to oppose the Motion has passed, with no responsive filing. "If an opposing party fails to file papers in the manner required by Civil Local rule 7.1.e.2, that failure may constitute a consent to the granting of a motion or other request for ruling by the court." Civ. L.R. 7.1.f.3.c.

Plaintiff Citibank N.A. ("Citibank"), proceeding as Deed of Trust Trustee with respect to a parcel of real property located in National City, it acquired following a foreclosure sale in June 2008, filed an unlawful detainer action in San Diego County Superior Court on July 9, 2008. The Superior Court action Citibank filed seeks Ortiz's post-foreclosure eviction from the premises, possession of the premises, and recovery of the reasonable rental value of the premises, represented to be \$22.00 per day, from June 17, 2008 forward until Ortiz

1 vacates the premises. Citibank moves to remand this action for improper removal to federal  
2 court and also seeks its costs of suit incurred to dispose of the federal case.

3 In his Petition For Removal, Ortiz asserts diversity jurisdiction purportedly exists over  
4 the claims Citibank presents in its unlawful detainer action. However, his conclusory  
5 representation that he is a citizen of California and Citibank, which clearly has a presence  
6 in California commercial transactions, is a "National Association" operating "internationally  
7 in 23 countries outside the United States," even if he is correct Citibank's principal place of  
8 business "on information and belief" is San Antonio, Texas, is insufficient to establish  
9 diversity jurisdiction. In further support of the federal jurisdiction he invoked, he cites several  
10 federal statutes Citibank allegedly violated through its purported fraud, even though he  
11 expressly acknowledges federal question jurisdiction "does not appear on the face of  
12 Plaintiff's complaint." Removal Pet. ¶ 3. Finally, he vaguely asserts Citibank and others  
13 violated due process and applied California statutes in an allegedly unconstitutional manner  
14 associated with the foreclosure and unlawful detainer actions.

15 As argued by Citibank, federal jurisdiction must appear from the face of a Complaint  
16 showing federal law creates the cause of action or the plaintiff's right to relief necessarily  
17 depends on a resolution of a question of federal law. Franchise Tax Bd. v. Construction  
18 Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). No such grounds appear from the face  
19 of the Citibank Complaint. Neither allegations or affirmative defenses in an Answer nor in  
20 the petition for removal can create federal jurisdiction. See Wayne v. DHL Worldwide  
21 Express, 294 F.3d 1179, 1183 (9th Cir. 2002); Gully v. First Nat. Bank, 299 U.S. 109, 113  
22 (1936). Similarly, removability cannot be created by a defendant pleading a federal question  
23 in a counter-claim. Takeda v. Northwestern Nat. Life Ins. Co., 765 F.2d 815, 822 (9th Cir.  
24 1985). In addition, federal courts lack jurisdiction to adjudicate title or interests in real  
25 property absent an interest in the property claimed by the United States, a circumstance not  
26 present here. See 28 U.S.C. § 24009a; Leisnol, Inc. v. United States, 170 F.3d 1188, 1192  
27 (9th Cir. 1999). Finally, Citibank correctly notes the "summary character of [an unlawful  
28 detainer action] would be defeated if, by cross-complaint or counter-claim, issues irrelevant

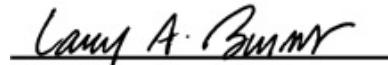
1 to the right of immediate possession could be introduced." Glendale Fed. Bank v. Hadden,  
2 73 Cal.App.4th 1150, 1153 (1999) (citation omitted).

3 Citibank is also correct that remand is appropriate either for lack of federal subject  
4 matter jurisdiction or for "any defect in the removal procedure." 28 U.S.C. § 1447(c); see  
5 Buckner v. FDIC, 981 F.2d 816, 820 (5th Cir. 1993). The procedures for proper removal of  
6 an action from state to federal court appear at 28 U.S.C. § 1446. The propriety of removal  
7 is determined solely on the basis of pleadings filed in state court, as the focus is on "the  
8 complaint at the time the removal was filed." Libhart v. Santa Monica Dairy Co., 592 F.2d  
9 1062, 1065 (9th Cir. 1979). The removal statute is strictly construed, and the burden to  
10 demonstrate the existence of federal jurisdiction is on the party invoking the removal statute.  
11 Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006). Ortiz's removal  
12 petition may be fairly construed as an expansive responsive pleading raising counterclaims  
13 and affirmative defenses, rather than a "short and plain statement of the grounds for  
14 removal" discernable from the Citibank Complaint. 28 U.S.C. § 1446(a).

15 For all the foregoing reasons, the removal is defective substantively and procedurally,  
16 and the Motion is **GRANTED**. However, while Citibank understandably urges the Court to  
17 construe the attempted removal as a tactic to delay and otherwise impede its right to recover  
18 possession of its real property, in consideration of Ortiz's *pro se* status, the Court declines  
19 to award attorneys' fees and costs incurred to seek this remand, and **DENIES** any award of  
20 associated fees and costs. **IT IS HEREBY ORDERED** the matter is remanded to state court,  
21 terminating this federal action.

22 **IT IS SO ORDERED.**

23 DATED: October 27, 2008

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25 **HONORABLE LARRY ALAN BURNS**  
26 United States District Judge  
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